

EXHIBIT 3
part 2 of 3

1 recommendation as to the plea. (*Id.*)

2 In regard to prejudice, petitioner only states that there was a
3 viable defense based on the inadmissibility of his confession due to a
4 violation of his *Miranda* rights. Petitioner does not further discuss
5 this contention.

6 Accordingly, petitioner has failed to make a *prima facie* case of
7 ineffective assistance of counsel. Petitioner has the burden of
8 pleading sufficient grounds for relief. (*People v. Duvall* (1995) 9
9 Cal.4th 464, 474.) Specifically, petitioner must plead facts which,
10 if true, would entitle him to relief. (*Id.* at 474-75.)

11 D. Conclusion.

12 For all of the foregoing reasons, the petition is DENIED.
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16 DATED: _____, 1996

ROBERT M. FOLEY

ROBERT M. FOLEY
JUDGE OF THE SUPERIOR COURT

19 cc: Petitioner
20 Santa Clara County District Attorney
21 Research
22 File
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EXHIBIT C

1 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
2 IN AND FOR THE COUNTY OF SANTA CLARA

3 BEFORE THE HONORABLE ROBERT M. FOLEY, JUDGE

4 DEPARTMENT 5

5 ---oOo---

ENDORSED
FILED
DEC 19 1985

DEPUTY

Clerk

6
7 THE PEOPLE OF THE STATE OF CALIFORNIA,

8 Plaintiff,

9 -vs-

10 IGNACIO P. PENA,

11 Defendant.

No. 96973

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18 REPORTER'S TRANSCRIPT OF PROCEEDINGS

19 Held on October 17, 1985

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21 APPEARANCES:

22 For the People:

OFFICE OF THE DISTRICT ATTORNEY
BY: ROD BRAUGHTON, D.D.A.

23 For the Defendant:

DANIEL HERNANDEZ,
ATTORNEY AT LAW

24 Spanish Interpreter:

Evelyn Aaron

25 Official Court Reporter:

Barbara T. Ives, CSR No. 448

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28 ---oOo---

San Jose, California

October 17, 1985

PROCEEDINGS

THE COURT: Once again, the matter of People versus Ignacio P. Pena, Information 96973. Might I have your appearances for the record, please.

MR. BRAUGHTON: People are represented by Rod Braughton from the District Attorney's Office.

MR. HERNANDEZ: Daniel Hernandez appearing for Mr. Pena, Your Honor, who is present.

THE COURT: Spanish interpreter is also present. Might we have your name for the record.

MS. AARON: Evelyn Aaron, A-a-r-o-n.

THE COURT: You have been previously sworn and certified pursuant to the appropriate government code sections?

MS. AARON: Yes, I have, Your Honor.

THE COURT: Thank you. Mr. Hernandez?

MR. HERNANDEZ: Yes, Your Honor. We requested some discussion as to one of the potential offers that the People have made to my client and that my client is willing to -- is prepared to -- after some discussion, I think, to make to the People. We are basically talking about second degree in this case. And he has some matters or some questions that he would like to clear up before he changes his plea, if that's what the People agreed to.

THE COURT: Now, wait a minute. My understanding -- I may be wrong, but my understanding is that the People have made no offer.

MR. HERNANDEZ: Right.

THE COURT: This is an offer, as I understand it, by Mr. Pena to the People.

1 MR. HERNANDEZ: That's correct, Your Honor. I was just
2 saying that we had prior discussions revolving around the possibility
3 of an offer. We are prepared to make that offer as soon as my client
4 is satisfied. He has some preliminary questions that I wanted to discuss
5 in chambers, but we decided to do it on the record.

6 There are some clarifications and reassurances from the
7 Court that my client wants before the offer is made.

8 THE COURT: You mean, you want a commitment from me that if
9 the defendant did a certain thing and the People acceded to that, would
10 I commit myself to certain things?

11 MR. HERNANDEZ: I think -- We have explained to our client
12 certain things in terms of the degrees and the time and the type of --
13 the terms and punishment that apply to second degree. I think he has
14 some certain questions that he wanted us to clarify, both with the
15 People and with the Court for him.

16 He may have some direct questions himself, prior to making
17 the offer.

18 THE COURT: Well, would the People be at all interested
19 in an offer by Mr. Pena to plead to a charge of second degree murder and
20 admit the use of the firearm?

21 MR. BRAUGHTON: Your Honor, if Mr. Pena is willing to plead
22 guilty exactly as charged in the Information, the People would consider
23 stipulating that the murder is a murder of the second degree.

24 THE COURT: Fine. Thank you. What are Mr. Pena's concerns?

25 MR. HERNANDEZ: I think the consideration or the concern of
26 Mr. Pena has been -- from our discussions, is the gun allegation. If
27 there was no gun allegation, I think -- That was his basic concern, was
28 that if there was no gun allegation in the second degree, that he would

1 be more than willing to make that offer formally.

2 THE COURT: In other words, then, Mr. Pena is offering
3 to plead to the count in the information on a stipulation that it's
4 in the second degree, but he does not wish to admit the personal use
5 of a firearm?

6 MR. HERNANDEZ: In all candidness, he is concerned about
7 the additional term that would go along with that.

8 THE COURT: Two years.

9 MR. HERNANDEZ: That's his basic concern, from what I
10 understood. Perhaps if he has his own questions, or I would be more
11 than willing to stipulate that he could ask the Court directly himself
12 if he wishes to. That is my interpretation of what his concern was.

13 THE COURT: You know what the law is. Two additional
14 years are normally imposed for the personal use of a firearm. My
15 understanding of the evidence in the case is that it will be demonstrated
16 that he personally used a firearm in the commission of the murder.

17 Assuming that there was a murder. I think, really, the
18 only thing we are talking about is, is it a first or is it a second?

19 If it's either one, I am kind of convinced that the
20 evidence will demonstrate that a gun was used.

21 MR. HERNANDEZ: Perhaps, I think if the Court were to
22 clarify to my client, not only to me but through their own understanding
23 that it would be at this point impossible to entertain an offer --
24 or that the People may not be willing to entertain an offer without
25 the gun allegation, perhaps we are at the point where we have to make
26 that final decision.

27 THE COURT: That's a decision I think that you are going to
28 have to make. Mr. Braughton has represented that he wants the defendant

1 to admit everything contained in the Information. If the defendant will
2 do that, he will stipulate that it is a murder in the second degree.

3 I didn't misunderstand you, did I?

4 MR. BRAUGHTON: No, sir.

5 THE COURT: So, I take it then, if you will, I wouldn't term
6 it an offer by the People. If that's a word that you want to use, it's
7 an offer to plead to a second and admit the use. And then, by law,
8 that would place a maximum ceiling upon any punishment of no more than
9 seventeen years to life in prison, as opposed to a first degree, which
10 would be twenty-seven years to life.

11 (Off-the-record discussion between the defendant and
12 his counsel.)

13 MR. HERNANDEZ: Your Honor, I think I have explained
14 basically to my client the laws applied under Article 2.5 and
15 Sections 2930 through 34 of the Penal Code having to do with time and
16 the reduction of time once he is sentenced or once he is sent to the
17 Department of Corrections system.

18 I think that in order to solidify my explanations to him,
19 if the Court would be willing to reaffirm the possibilities of him
20 getting good time, good behavior time, lessening the seventeen years
21 to actual time that he is going to do of less than seventeen years,
22 if he complies with the rules once he is sentenced, I think he wants
23 to hear that from the Court in order to be reassured that that is
24 the policy.

25 Not so much that it's guaranteed, but that that is the
26 policy that -- that if his behavior is good and he cooperates with
27 the prison system in terms of his good time/work time, that he will
28 be given the benefit of --

1 and with malice aforethought kill Feliberto Valencia, a human being.

2 To that charge, how do you plead?

3 THE DEFENDANT: Guilty.

4 THE COURT: It is also alleged, sir, that during the
5 commission of that offense, you personally used a firearm, to wit: a
6 handgun, within the meaning of Penal Code Section 12022.5 and 1203.06.

7 Do you admit that you personally used a firearm during the
8 commission of the offense?

9 THE DEFENDANT: That's true.

10 THE COURT: By your plea, and admission, you are giving up
11 certain important rights. Now, I am sure that your attorney has
12 explained them to you. My purpose is to ascertain for the record that
13 you understand each right and that you are freely and voluntarily giving
14 up each right.

15 The first right you have is to a jury trial.

16 And before I go on, sir, let me explain that these rights
17 apply not only to the offense alleged in the Information, but also to
18 the allegation that you personally used a firearm. Do you understand
19 that, sir?

20 THE DEFENDANT: Yes.

21 THE COURT: Now, sir, the first right you have is to a jury
22 trial. A jury trial is a situation where twelve citizens are summoned
23 to court. They hear the facts of the case; they are instructed on the
24 law. They then retire to deliberate in secrecy.

25 You may not be convicted of the offense unless all twelve
26 of them agree that you are guilty beyond a reasonable doubt. Do you
27 understand the right to a jury trial?

28 THE DEFENDANT: I understand, but I waive -- I give up that

1 THE COURT: The problem I have with that is that's what the
2 law is. It's written right there in the book.

3 MR. HERNANDEZ: I understand that. I just don't happen to
4 have a Spanish version that he could read himself. He doesn't read
5 English.

6 THE COURT: Would the Spanish interpreter help then?
7 You read it in English to the Spanish interpreter.

8 MR. HERNANDEZ: We just talk to him at the side -- Can we
9 just have a little conference with him and explain it to him again?

10 THE COURT: I think we could go off the record at this
11 point, take a recess. Just read it to the Spanish interpreter. She
12 can read it to Mr. Pena. When you're through, let us know and we'll
13 take the matter up again. I don't want to wear out the reporter.

14 (The Court was in recess.)

15 THE COURT: Reconvening the matter of People versus
16 Ignacio Pena. The record will reflect that all parties who were in
17 the court when it recessed are once again in the court.

18 Mr. Hernandez, I understand that Mr. Pena wishes to
19 plead to the count so long as it is stipulated to be murder in the
20 second degree, and he will admit the personal use of a firearm.

21 MR. HERNANDEZ: That's correct, Your Honor.

22 THE COURT: Very well. Mr. Pena, we are going to have a
23 discussion regarding the rights you give up when you change your plea.
24 If I use any language you do not understand, please interrupt me,
25 indicate that, and I will attempt to clarify it. Is that agreed, sir?

26 THE DEFENDANT: (Through the interpreter) Yes.

27 THE COURT: You are accused in the count, Mr. Pena, with
28 a felony violation of Penal Code Section 187 in that you did unlawfully

1 right.

2 THE COURT: First, sir, do you understand the right to a
3 jury trial?

4 THE DEFENDANT: Yes.

5 THE COURT: Do you give up that right?

6 THE DEFENDANT: Yes.

7 THE COURT: With the consent of the People, you would have
8 the right to a Court trial. A Court trial is a situation where the judge
9 alone hears the facts of the case, and the judge alone determines
10 your innocence or guilt of the charge.

11 Do you understand the right to a Court trial?

12 THE DEFENDANT: Yes.

13 THE COURT: Do you give up that right?

14 THE DEFENDANT: Yes.

15 THE COURT: At a trial, you would have the right to confront
16 and to cross-examine your accusers. Your accusers are the witnesses
17 who would be summoned to court to testify against you.

18 Do you understand that right?

19 THE DEFENDANT: Yes.

20 THE COURT: Do you give up that right?

21 THE DEFENDANT: Yes.

22 THE COURT: You would have the right to use the subpoena
23 power of the Court to compel the attendance of witnesses to appear at
24 the trial to testify on your behalf.

25 Do you understand that right?

26 THE DEFENDANT: Yes.

27 THE COURT: Do you give up that right?

28 THE DEFENDANT: Yes, Your Honor.

1 THE COURT: You would have the right at a trial to testify
2 on your own behalf and to present a defense. Do you understand that
3 right?

4 THE DEFENDANT: Yes.

5 THE COURT: Do you give up that right?

6 THE DEFENDANT: Yes.

7 THE COURT: You have the right to remain silent. By that,
8 I simply mean you cannot be made to say anything whatsoever about the
9 offense. Do you understand that right?

10 THE DEFENDANT: Yes.

11 THE COURT: Do you give up that right?

12 THE DEFENDANT: Yes.

13 THE COURT: Have you had ample time and opportunity to
14 discuss your case with your attorney?

15 THE DEFENDANT: Yes.

16 THE COURT: Have you received the full benefit of his advice?

17 THE DEFENDANT: Yes.

18 THE COURT: Has your attorney explained to you the elements
19 of the offense, and the possible defenses to the charge?

20 THE DEFENDANT: Yes.

21 THE COURT: Is your plea and admission entered freely and
22 voluntarily?

23 THE DEFENDANT: Yes, Your Honor.

24 THE COURT: Has anyone threatened you or tried in any other
25 way to force you to enter your plea?

26 THE DEFENDANT: No, sir.

27 THE COURT: Have any promises been made to you to induce
28 you to enter your plea, other than the one stated on the record

1 this morning? And the promise is that this is a plea to a murder
2 stipulated to be in the second degree.

3 Were there any other promises made to you?

4 THE DEFENDANT: No, sir.

5 THE COURT: Are you now under the influence of any
6 alcoholic beverage or drug?

7 THE DEFENDANT: No.

8 THE COURT: Turning to the consequences of your plea,
9 you are advised if you are not a citizen, conviction of this offense
10 may have the consequences of deportation, exclusion from admission
11 or denial of naturalization.

12 Mr. Pena, for the offense of murder in the second degree,
13 you may be punished by an indeterminate sentence of fifteen years
14 to life in the State Prison.

15 You are admitting the allegation of a personal use of the
16 firearm; that could increase that sentence by two additional years.
17 So, the maximum punishment in your case would be seventeen years to
18 life in prison.

19 Do you understand that, sir?

20 THE DEFENDANT: Yes.

21 THE COURT: I also should advise you, Mr. Pena, because you
22 are admitting the personal use of a firearm, you are statutorily
23 ineligible for probation. Even if the Court desired to place you on
24 probation, it could not.

25 Do you understand that, sir?

26 THE DEFENDANT: Yes.

27 THE COURT: So, the only alternative the Court has is to
28 sentence you to prison. Do you understand that, sir?

1 THE DEFENDANT: Yes, Your Honor.

2 THE COURT: Once you have served the sentence imposed by
3 the Court, you will be released on parole for a period of --

4 MR. BRAUGHTON: Potentially life-time parole, I believe.

5 THE COURT: You're right. Because it's an indeterminate
6 term. Some day, they are going to correct that, I know.

7 Sir, when you are released from prison, you will be placed
8 on parole. The period of parole could extend for the duration of your
9 natural life. That is a matter that is left in the hands of the
10 Department of Corrections. It will be an administrative decision as
11 to how long you shall remain on parole.

12 Do you understand that, sir?

13 THE DEFENDANT: Yes, Your Honor.

14 THE COURT: Now, if you violate any term or condition of
15 your parole, your parole could be revoked and you could be returned
16 to prison for an indeterminate period of time.

17 Do you understand that, sir?

18 THE DEFENDANT: Yes, Your Honor.

19 THE COURT: Mr. Pena, you are being convicted of a serious
20 felony, murder in the second degree. Hereafter, if you are convicted
21 of any other serious felony, this conviction will be used to enhance
22 any other subsequent sentence by five additional years in prison.

23 You understand that, sir?

24 THE DEFENDANT: Yes, Your Honor.

25 THE COURT: Also, as a consequence of your plea, the Court
26 must at the time of sentencing impose a restitution fine of not less than
27 one hundred dollars or more than ten thousand dollars.

28 Do you understand that, sir?

1 THE DEFENDANT: Yes, Your Honor.

2 THE COURT: How old are you, Mr. Pena?

3 THE DEFENDANT: Twenty-two years old.

4 THE COURT: What is your educational background; did you
5 complete high school?

6 THE DEFENDANT: No.

7 THE COURT: What is the highest grade that you completed, sir?

8 THE DEFENDANT: Sixth grade in Mexico, elementary school
9 in Mexico.

10 THE COURT: Sir, do you read and write?

11 THE DEFENDANT: Yes.

12 THE COURT: In Spanish, I trust?

13 THE DEFENDANT: Yes.

14 THE COURT: Do you have any questions that you wish to
15 ask your attorney, the District Attorney, or myself about your change
16 of plea?

17 THE DEFENDANT: No, Your Honor.

18 THE COURT: Mr. Pena, have you understood everything I
19 have said to you this morning as translated to you by the Spanish
20 interpreter?

21 THE DEFENDANT: Yes, Your Honor.

22 THE COURT: And this is what you want to do?

23 THE DEFENDANT: Yes.

24 THE COURT: You are satisfied that you have had sufficient
25 time to discuss this matter with your attorney; you have weighed the
26 options, and you do want to proceed in this fashion?

27 THE DEFENDANT: Yes, Your Honor.

28 THE COURT: All right. I am satisfied. Any questions?

1 MR. BRAUGHTON: No, thank you.

2 THE COURT: Mr. Hernandez, you do concur in the plea and
3 admission?

4 MR. HERNANDEZ: I do concur, Your Honor.

5 THE COURT: Might I have a stipulation from the attorneys
6 that there is a factual basis for the plea and admission, and the Court
7 in that regard may consider the Preliminary Examination transcript?

8 MR. HERNANDEZ: So stipulated.

9 MR. BRAUGHTON: Yes, Your Honor. And also the court clerk
10 has an interpretation of a pretrial statement made by Mr. Pena
11 interpreted by a certified court interpreter. I would also ask that
12 that be a stipulated part of the factual record the Court may consider.

13 THE COURT: Agreed?

14 MR. HERNANDEZ: We can't agree to that; that isn't
15 necessary, Your Honor. It appears that that translation was brought
16 in, and there is a lot of questions as to its validity, if terms are
17 correct interpretations.

18 We just don't see any reason to stipulate to that. It
19 may be a little bit -- Well, it may be -- I mean, I wouldn't be
20 representing my client properly.

21 THE COURT: Let me ask you this. Will you stipulate that
22 the Court may also consider the police offense reports arising out
23 of the transaction?

24 MR. HERNANDEZ: We will stipulate to that.

25 THE COURT: Agreed?

26 MR. BRAUGHTON: That's fine.

27 THE COURT: Very good. Once again, Mr. Pena, how do you
28 plead to the count alleged in the Information that you committed a

1 felony violation of Penal Code Section 187 and that you did unlawfully
2 and with malice aforethought kill Filiberto Valencia, a human being?
3 What is your plea, sir?

4 THE DEFENDANT: Guilty.

5 THE COURT: And to the allegation that during the commission
6 of the offense, you personally used a firearm, to wit: a handgun,
7 within the meaning of Penal Code Section 12022.5 and 1203.06, do you
8 admit that allegation?

9 THE DEFENDANT: Yes, Your Honor.

10 THE COURT: And before I accept the plea, I believe that
11 there is a stipulation by the parties that the plea is to be accepted
12 to an offense of murder in the second degree.

13 MR. BRAUGHTON: So stipulated, Your Honor, by the People.

14 MR. HERNANDEZ: So stipulated, Your Honor.

15 THE COURT: Very good. Mr. Pena, your plea is accepted.
16 The Court finds that you have knowingly, intelligently and voluntarily
17 waived your rights to jury trial, to remain silent, and to confront
18 and to cross-examine the witnesses.

19 I find you understand the nature of the charge, the
20 elements of the offense, possible defenses, and the maximum punishment
21 that may be imposed.

22 Pursuant to stipulation, the Preliminary Examination
23 transcript and the offense reports, the Court finds a factual basis
24 for the plea.

25 The Court would also find that the plea is entered
26 knowingly, intelligently and voluntarily with full knowledge of its
27 meaning and effect.

28 Your matter will be referred to the Adult Probation Department

1 for a report. Does Mr. Pena wish to waive time for sentencing or not?

2 MR. HERNANDEZ: He was concerned about being sentenced as
3 soon as possible.

4 THE COURT: As soon as possible. Very good. Set the
5 matter for receipt of the report and pronouncement of judgment
6 November 12th, 1985 at 9 o'clock a.m.

7 And the reason for this particular disposition would be
8 the state of the evidence?

9 MR. BRAUGHTON: Yes, Your Honor. That appears to me a
10 reasonable disposition in light of the facts of the case as contained
11 in the Preliminary Hearing transcript and the police reports.

12 THE COURT: Very good. So noted for the record.

13 Madam clerk, you are directed to record that plea as to
14 murder in the second degree. Thank you very much.

15 MR. BRAUGHTON: Your Honor, prior to departing for the day,
16 I would like to file a Notice of Motion; request the Court set a
17 hearing for sanctions with regard to the delays that have occurred
18 in the trial, to the witnesses pursuant to 128.5 and 177.5 of the
19 Code of Civil Procedures.

20 THE COURT: All right. When would be a convenient date
21 for counsel?

22 MR. BRAUGHTON: I would request you set it at the
23 convenience of Mr. Hernandez.

24 THE COURT: All right. The sentencing shall proceed in
25 Department 14 downtown Superior Court.

26 MR. HERNANDEZ: Has this been filed?

27 THE COURT: It was just filed with the clerk, I believe,
28 wasn't it? I'll tell you what we'll do. We are all going to be

1 together on November 12th. Why don't we hold it then.

2 MR. BRAUGHTON: Satisfactory.

3 THE COURT: Fine. Set for hearing November 12, 1985,
4 9 o'clock a.m. or as soon thereafter as counsel may be heard.

5 MR. BRAUGHTON: Thank you.

6 ---oOo---

1 STATE OF CALIFORNIA
2 COUNTY OF SANTA CLARA -)
3)
4)
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ss.

7 I, BARBARA IVES, do hereby certify that:

8 I am an Official Shorthand Reporter of the
9 Superior Court of the State of California, in and for
10 the County of Santa Clara, and that as such I reported
11 in stenotype the proceedings had in the within-entitled
12 matter at the time and place therein set forth; and
13 that the same is a full, true and correct transcription
14 of said stenotype as reported by me to the best of my
15 ability.

16 DATED: This 2 day of December 1987.
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21 Barbara T. Ives
22 Barbara T. Ives, CSR #4438
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EXHIBIT D

1 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

2 IN AND FOR THE COUNTY OF SANTA CLARA (ENDORSED)

3 BEFORE THE HONORABLE ROBERT M. FEELEY, JUDGE
4 CRIMINAL LEGAL BUILDING, DEPT. NO. 40 NOV 20 1985
5

6 --000--

Clerk
Deputy

7 THE PEOPLE OF THE STATE OF
8 CALIFORNIA,

9 PLAINTIFF,

10 VS.

11 IGNACIO P. PENA,

12 DEFENDANT.

) NO. 96973

) CHARGE: VIOLATION SECTION

) 187 PC

) STATE PRISON

13
14 REPORTER'S TRANSCRIPT OF PROCEEDINGS

15 ON REPORT AND SENTENCING

16 TUESDAY, NOVEMBER 12, 1985

17
18 A P P E A R A N C E S:

19 FOR THE PEOPLE:

DEPUTY DISTRICT ATTORNEY
BY: ROD BRAUGHTON

20
21 FOR THE DEFENDANT:

ATTORNEY AT LAW
BY: DANIEL HERNANDEZ
MARAVILLAS SHIVELY

22 SPANISH INTERPRETER:

23 ADULT PROBATION:

24 REPORTED BY:

RETHA FULLER, CSR 1611
OFFICIAL COURT REPORTER

25
26
COPY

1 ROBERT M. FOLEY, JUDGE

NOVEMBER 12, 1985

2 DEPT. NO. 4

TUESDAY

3
4 P R O C E E D I N G S

5 --000--

6 THE COURT: LINE THREE, IGNACIO PENA,
7 INFORMATION 96973.

8 MR. HERNANDEZ: DANIEL HERNANDEZ FOR MR.
9 PENA.

10 THE COURT: MR. PENA IS PRESENT.

11 MR. HERNANDEZ: YES, HE IS PRESENT.

12 THE COURT: YOUR NAME FOR THE RECORD, MA'AM?

13 THE INTERPRETER: MARAVILLAS SHIVELY (SPELLING)
14 S-H-I-V-E-L-Y.

15 THE COURT: YOU'RE THE SPANISH INTERPRETER?

16 THE INTERPRETER: YES, YOUR HONOR.

17 THE COURT: YOU'RE CERTIFIED ACCORDING TO THE
18 APPROPRIATE GOVERNMENT ORDINANCES AND YOU HAVE ALREADY
19 BEEN SWORN?

20 THE INTERPRETER: YES, YOUR HONOR.

21 THE COURT: VERY WELL.

22 YOUR REQUEST IS TO CONTINUE THIS?

23 YOU HAVEN'T RECEIVED A PROBATION REPORT FOR THE
24 REQUISITE NINE DAY PERIOD. IS THAT TRUE?

25 MR. HERNANDEZ: I AM SORRY?

26 THE COURT: YOU HAVE NOT BEEN IN RECEIPT OF
27 THE PROBATION REPORT FOR THE REQUISITE NINE DAY PERIOD?

28 MR. HERNANDEZ: I HAVEN'T, BUT WE WILL WAIVE

1 THAT.

2 THE COURT: OH, DOES HE WISH TO PROCEED TO
3 JUDGMENT IMMEDIATELY?

4 MR. HERNANDEZ: YES, HE DOES.

5 THE COURT: IN THIS MATTER, THE COURT HAS
6 READ AND CONSIDERED THE PROBATION REPORT.

7 DOES THE DEFENDANT WAIVE FORMAL ARRAIGNMENT FOR
8 JUDGMENT?

9 MR. HERNANDEZ: SO WAIVED.

10 THE COURT: HAVE ANY LEGAL CAUSE WHY THE SAME
11 SHOULD NOT NOW BE PRONOUNCED?

12 MR. HERNANDEZ: NONE, YOUR HONOR.

13 THE COURT: NINE DAY RULE IS WAIVED?

14 MR. HERNANDEZ: NINE DAY RULE IS WAIVED.

15 THE COURT: IN VIEW OF THE PERSONAL USE OF A
16 FIREARM ALLEGATION BEING ADMITTED, THE DEFENDANT IS
17 STATUTORILY INELIGIBLE FOR PROBATION. HIS REQUEST FOR THE
18 SAME IS HEREBY DENIED.

19 AS TO THE COUNT, THE DEFENDANT WILL BE COMMITTED
20 TO THE DEPARTMENT OF CORRECTIONS FOR THAT, THE TERM
21 PRESCRIBED BY LAW. IN ADDITION THERETO, HE HAVING
22 PERSONALLY ADMITTED THE USE OF A FIREARM DURING THE
23 COMMISSION OF THE OFFENSE, THE COURT WOULD IMPOSE TWO
24 ADDITIONAL YEARS.

25 TOTAL TERM THIS INFORMATION SEVENTEEN YEARS TO LIFE.

26 THE DEFENDANT SHALL RECEIVE CREDIT FOR TIME SERVED
27 OF 389 ACTUAL DAYS AND 194 DAYS GOOD TIME-WORK TIME FOR A
28 TOTAL OF 583 DAYS.

1 MR. HERNANDEZ: YES, THAT PERFECT.

2 THE COURT: VERY GOOD. SET DECEMBER 16th 1985,

3 AT 1:30 P.M.

4
5 (WHEREUPON, THAT CONCLUDED THIS HEARING.)
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1 STATE OF CALIFORNIA)
2 COUNTY OF SANTA CLARA)

SS -

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4
5 I, RETHA FULLER, CERTIFIED SHORTHAND REPORTER
6 NO. C-1611, DO HEREBY CERTIFY:

7 THAT I WAS THE DULY APPOINTED, QUALIFIED
8 AND ACTING OFFICIAL SHORTHAND REPORTER OF SAID COURT IN
9 THE ABOVE-ENTITLED ACTION TAKEN ON THE ABOVE-MENTIONED
10 DATE:

11 THAT I REPORTED THE SAME IN MACHINE
12 SHORTHAND AND THEREAFTER HAD THE SAME TRANSCRIBED
13 INTO TYPEWRITING AS HEREIN APPEARS:

14 THAT THE FOREGOING TYPEWRITTEN PAGES
15 CONTAIN A FULL, TRUE AND CORRECT TRANSCRIPT OF ALL OF
16 THE PROCEEDINGS HAD IN SAID MATTER AT SAID TIME AND
17 PLACE, TO THE BEST OF MY ABILITY.

18
19
20 DATED: THIS 1 DAY OF 11, 1985.

21
22
23
24
25 RETHA FULLER, CSR NO. C-1611
26 OFFICIAL COURT REPORTER
27
28

EXHIBIT E

RECALCULATION OF MEPD FOR 15-LIFE AND 25-LIFE PRISONERS
 RECEIVED PRIOR TO 5-27-87
 PURSUANT TO IN RE MONIGOLD (1988) 205 CAL. APP. 3d 1224
 NO DSL TERM OR DSL TERM COMPLETED

- A. CREDITS VESTED PER PC2934 (If offense date prior to 1-1-83)
1. Total days served prior to waiver date (Waiver date - received date + postsentence credit) = 1
 2. A1 ÷ 2 (round down) = 0
 3. Less credits lost per PC2932 (PRIOR TO WAIVER) = 0
 4. Credits to be vested = 0

B. MAXIMUM ELIGIBLE PAROLE DATE

1. 11-14-85 + 17 = 11-14-2002
 RECEIVED DATE TOTAL TERM
 BASE DATE
2. Less total preincarceration credit = 584
3. Less A4 OR vest 1/2 postsentence credit = 0
4. MAXIMUM ELIGIBLE PAROLE DATE = 4-9-2001

C. WORKTIME CREDIT PER PC2933/PC2934

1. Less NET Worktime credit earned from waiver/ received date through 2-15-89 or end of DSL term if later = 1,011
2. Current MEPD (cannot exceed B4) = 7-3-98

D. GOOD TIME CREDIT PER PC2931

1. Date credit applied through (2-15-89 or date DSL term ends if later) = 2-15-89
2. Days left to serve = 3,425
3. Divide by 3 (round up) = 1142
4. PC Balance (D3 ÷ 4) = 285
5. BC Balance (D4 x 3) = 857

E. RECALCULATED MEPD (C2 - D3)

1. Add credits lost for CDC 115's after D1 = 5-18-95
2. Subtract restorations for credit losses in E1 + PC BC
3. New PC/BC Balance PC= BC=
4. Add any 7 or 9 year MEPD CS Life term(s) +

F. ADJUSTED MEPD (E + E1 - E2 + E4)

G. INITIAL PAROLE CONSIDERATION HEARING
 (13 months prior to F)

= 4-94
 month/year

H. NEXT DOCUMENTATION HEARING # 2

= 1-92
 month/year

Your Minimum Eligible Parole Date has been recalculated pursuant to In Re Monigold and you have been granted 1,011 days worktime credit from 11-14-85 through 2-15-89 the end of your DSL term (circle one). Your recalculated adjusted (circle one) MEPD is 5-18-95. Your initial life parole consideration hearing will be scheduled during the month of 4-94 first available calendar (circle one).

Manda R. Rubalcaba
 CASE RECORDS STAFF

9-13-89
 DATE

D-17862
 NUMBER

Pena, Ignacio
 NAME

CMF-5
 INSTITUTION

5/89

FORM A - SIDE 1

1271 - 1086

1 HE IS ORDERED TO PAY A ONE HUNDRED DOLLAR
2 RESTITUTION FINE.

3 WHEN YOU'RE RELEASED, SIR, YOU WILL BE PLACED ON
4 PAROLE FOR A PERIOD OF -- COULD LAST FOR THE TERM OF YOUR
5 NATURAL LIFE, COULDN'T IT, MR. BRAUGHTON?

6 MR. BRAUGHTON: YES.

7 THE COURT: YOU WILL BE PLACED ON PAROLE FOR
8 AN INDETERMINATE TIME. VIOLATION OF ANY TERM OR
9 CONDITION OF YOUR PAROLE WILL RESULT IN ONE YEAR INCARCERATION
10 IN PRISON FOR EACH SEPARATE VIOLATION.

11 NO CHARGES ARE TO BE DISMISSED.

12 MR. HERNANDEZ: THANK YOU, YOUR HONOR.

13
14 (WHEREUPON, THAT CONCLUDED THIS PORTION OF HEARING.)

15
16 THE COURT: I BELIEVE THERE IS ANOTHER MATTER,
17 MR. HERNANDEZ. THAT IS A MOTION BY THE PEOPLE TO IMPOSE
18 SANCTIONS. I UNDERSTAND FROM YOU, YOU WISHED TO CONSULT
19 WITH AN ATTORNEY ABOUT THE MATTER?

20 MR. HERNANDEZ: THAT IS CORRECT, YOUR HONOR.

21 THE COURT: HOW LONG WOULD YOU BE --

22 MR. HERNANDEZ: I NEED THIRTY DAYS. I WILL
23 BE IN LOS ANGELES FOR A WEEK OR TWO. I WOULD LIKE SOME
24 TIME TO PREPARE.

25 THE COURT: CHECK YOUR CALENDAR. I WOULD LIKE
26 TO SET IT FOR DECEMBER 16th, MONDAY, AT 1:30 IN THE
27 AFTERNOON.

28 IS THAT A CONVENIENT DATE?

EXHIBIT F

SUBSEQUENT PAROLE CONSIDERATION HEARING
STATE OF CALIFORNIA
BOARD OF PRISON TERMS

In the matter of the Life)
Term Parole Consideration)
Hearing of:)

IGNACIO PENA)

CDC Number D-17862

COPY
INMATE

CALIFORNIA STATE PRISON, SOLANO

VACAVILLE, CALIFORNIA

NOVEMBER 18, 2002

2:15 P.M.

PANEL PRESENT:

JONES MOORE, Presiding Commissioner
GEORGE LEHMAN, Deputy Commissioner

OTHERS PRESENT:

IGNACIO PENA, Inmate
STEVE SANDERS, Attorney for Inmate
ROD BRAUGHTON, Deputy District Attorney
LEO MARTINEZ, Interpreter

CORRECTIONS TO THE DECISION HAVE BEEN MADE

✓

No
Yes

See Errata Sheet

Valerie Lord, Transcriber Capitol Electronic Reporting

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--oOo--

1

P R O C E E D I N G S

2 **PRESIDING COMMISSIONER MOORE:** This is a
3 Subsequent Parole Consideration Hearing for
4 Ignacio Pena, P-E-N-A, CDC number D-as in
5 David-17862. The date of the hearing would be
6 November the 18th 2002, and the time is
7 approximately 1415 hours. The location would be
8 the California State Prison, Solano. The legal
9 status of the prisoner, the date the prisoner was
10 received would be November the 14th of 1985. The
11 date the life term started would be February 20th
12 of 1986, from the County of Santa Clara. The
13 offense would be murder second with the use of a
14 firearm, case number 96973, count one. Penal Code
15 Section violated would be 187 and 12022.5 The
16 term would be 17 to life and the minimum eligible
17 parole date would be February 26th of 1996. And,
18 Mr. Martinez, can we swear you in now. Do you
19 solemnly swear to translate from English to
20 Spanish, Spanish to English for the hearing today?

21 **INTERPRETER MARTINEZ:** Yes, I do.

22 **PRESIDING COMMISSIONER MOORE:** Thank you,
23 sir. Now, Mr. Pena, this hearing will be
24 tape-recorded, and for voice recognition purposes
25 we will state our full name, spelling our last
26 name, stating the purpose of our business. And
27 then when it's your turn, if you would also add

2

1 your CDC number, please. We'll go around the room
2 to my right. My name is Jones Moore, M-O-O-R-E,
3 Commissioner, Board of Prison Terms.

4 **DEPUTY COMMISSIONER LEHMAN:** George Lehman,
5 L-E-H-M-A-N, Deputy Commissioner.

6 **DEPUTY DISTRICT ATTORNEY BRAUGHTON:** My name
7 is Rod Braughton, B-R-A-U-G-H-T-O-N, I'm the
8 Deputy District Attorney for Santa Clara County.
9 I represent the People in this hearing.

10 **ATTORNEY SANDERS:** Steve Sanders, spelled
11 S-A-N-D-E-R-S, and I'm counsel for Mr. Pena.

12 **INMATE PENA:** Pena, P-E-N-A, D-17862.

13 **INTERPRETER MARTINEZ:** Leo Martinez,
14 M-A-R-T-I-N-E-Z, certified interpreter.

15 **PRESIDING COMMISSIONER MOORE:** Thank you,
16 sir. Let the record show that there are two
17 correctional peace officers in the room here
18 strictly for safety and security measures,
19 Mr. Pena, and they'll play no role in today's
20 proceedings. Now the purpose of the hearing is to
21 once again consider your suitability for parole.
22 We will consider your crime, your prior criminal
23 and social history, and your behavior and
24 programming since your commitment. We've reviewed
25 your Central file and the prior transcripts and
26 you will have an opportunity to correct or clarify
27 them for the record. We will consider your

3

1 progress since your last hearing, any new
2 psychiatric reports, and any other information
3 that may have a bearing on your suitability for
4 parole. Any change in your parole plans should be
5 brought to our attention. Before we recess for
6 deliberations, the District Attorney, your
7 attorney and you will be given an opportunity to
8 make a final statement regarding parole
9 suitability and the length of confinement. After
10 this is done, we will recess, clear the room and
11 deliberate. Once we've completed our
12 deliberations, we will resume the hearing and
13 announce our decision. The Board of Prison Terms'
14 rules and the law state that a parole date should
15 be denied if your release would pose an
16 unreasonable risk of danger to others. Counsel,
17 the prisoner has certain rights, have those rights
18 been met thus far?

19 **ATTORNEY SANDERS:** My client and I feel that
20 they have up to this time.

21 **PRESIDING COMMISSIONER MOORE:** Thank you,
22 sir. Are there any objections to the Panel
23 members today?

24 **ATTORNEY SANDERS:** No, we have no
25 objections.

26 **PRESIDING COMMISSIONER MOORE:** Now I note
27 that the prisoner refused to sign the ADA form.

4

1 Mr. Pena, is there a reason that you didn't sign
2 this ADA form?

3 **ATTORNEY SANDERS:** One moment, Commissioner.

4 **INMATE PENA THROUGH INTERPRETER:** I want to
5 put on an objection to the entire hearing.

6 **PRESIDING COMMISSIONER MOORE:** That's fine.
7 I'll give him an opportunity to object at another
8 point in the hearing. My question to you,
9 Mr. Pena, was why did you not sign the ADA form.
10 Do you have a disability, is that why you refused
11 to sign it?

12 **INMATE PENA THROUGH INTERPRETER:** No, I
13 don't have any.

14 **PRESIDING COMMISSIONER MOORE:** Mr. Sanders,
15 would you show him the document I'm referring to
16 there, it's on, in the miscellaneous, probably
17 three pages back.

18 **ATTORNEY SANDERS:** Three pages back?

19 **PRESIDING COMMISSIONER MOORE:** I think so,
20 two or three pages back. It's behind the stip
21 form and the request for interpreter form.

22 **ATTORNEY SANDERS:** This is what he's talking
23 about here, Mr. Pena. Reasonable accommodation,
24 that's the ADA form. Commissioner, if you look at
25 the other documents too, you can see that my
26 client has refused to sign the other documents as
27 well. His feeling and belief as he will explain

5

1 to you a little later on is that this hearing is a
2 violation of his rights.

3 **PRESIDING COMMISSIONER MOORE:** That's fine,
4 he's entitled to his feelings and his concerns.
5 I'm trying to --

6 **ATTORNEY SANDERS:** He's willing to state for
7 the record now that he has no disability that
8 would interfere with (inaudible) of this hearing.

9 **PRESIDING COMMISSIONER MOORE:** Is that
10 accurate, Mr. Pena, you have no --

11 **INMATE PENA THROUGH INTERPRETER:** Yes, Sir.

12 **PRESIDING COMMISSIONER MOORE:** All right,
13 thank you, sir. Now, you'll receive a copy of our
14 written tentative decision today. The decision
15 becomes effective in 120 days. Copies of the
16 transcript and the decision will be sent to you
17 and you will have 90 days from that effective date
18 to appeal if you so desire. You are not required
19 to discuss your offense, nor are you required to
20 admit your offense. However, the Panel does
21 accept as true the findings of the court. Now,
22 Mr. Sanders, have you seen this?

23 **ATTORNEY SANDERS:** Yes, I have.

24 **PRESIDING COMMISSIONER MOORE:** Okay, and you
25 have those documents?

26 **ATTORNEY SANDERS:** We have all the documents
27 on that list.

6

1 **PRESIDING COMMISSIONER MOORE:** Any
2 additional documents to submit at this time?

3 **ATTORNEY SANDERS:** Other than, well, yes we
4 do. This is a document that I've already
5 submitted to the Panel.

6 **PRESIDING COMMISSIONER MOORE:** Okay, I have
7 a copy of that already and now would be the
8 appropriate time as I was going to ask you are
9 there any objections at this time?

10 **ATTORNEY SANDERS:** Yes, my client has some
11 objections that he would like to make at this
12 time, Commissioner.

13 **INMATE PENA THROUGH INTERPRETER:** I want to
14 ask a few questions.

15 **PRESIDING COMMISSIONER MOORE:** This is not
16 an inquiry. This is not an inquiry time, sir. If
17 you have an objection, please state your objection
18 for the record.

19 **INMATE PENA THROUGH INTERPRETER:** I have the
20 objection right here and can you please read this
21 for the record.

22 **PRESIDING COMMISSIONER MOORE:** It's your
23 objection, please read it.

24 **INMATE PENA THROUGH INTERPRETER:** I'm going
25 to read it in English. Objections under
26 statements to counsel at the parole consideration
27 for life prisoners. (Inaudible) Penal Code

1 Section 3041, 3042. The Panel (inaudible)
2 jurisdiction to deny the prisoner his release on
3 parole because of the law of Penal Code Section
4 PCS 190 (inaudible) his sentence and authorize
5 work time and good time credits (inaudible)
6 measure approved by (inaudible) November 7th,
7 1978. Therefore, the hearing is invalid. The
8 Fourteenth Amendment of the United States
9 Constitution, under Article one, Section seven, of
10 the California Constitution, each guarantee that
11 no person shall be deprived of life, liberty or
12 property without due process of law, nor the equal
13 protection of the law. This constitutional
14 (inaudible) requires an administrative agency who
15 has been granted the authority to adopt rules and
16 regulations to be one, consistent and not in
17 conflict with the provisions of the enabling
18 legislation; and, two, reasonably necessary to
19 effect its purposes. The administrative agency
20 may not vary or enlarge the terms of such
21 legislation; i.e., the rules and regulations
22 within the scope of the authority (inaudible)
23 noted for the rules and regulations to be valid.
24 Simply stated, the Board of Prison Terms, BPT, is
25 without authority to determine the minimum term of
26 imprisonment imposed upon the prisoner by statute,
27 nor deny his release date that was calculated.

8

1 under the PCS 2932, subdivision (b), by the
2 Department of Corrections, for the following
3 numerical reasons, the prisoner raises his formal
4 objections.

5 **PRESIDING COMMISSIONER MOORE:** All right, so
6 as I understand it.

7 **INMATE PENA THROUGH INTERPRETER:** His
8 (inaudible) continues.

9 **PRESIDING COMMISSIONER MOORE:** That's fine,
10 but let me rule on the first portion of that
11 objection. We have the right under the Board of
12 Prison Terms' rules and 3041 and 3042 to hold this
13 hearing, so I am overruling your objection on that
14 note. You've had an administrative hearing,
15 you've had a (inaudible) hearing prior to coming
16 to prison that was by a court of law and since
17 you're here that means you're a prisoner in the
18 Department of Corrections. Proceed.

19 **INMATE PENA THROUGH INTERPRETER:**
20 Objections, number one, under the Doctrine of --

21 **ATTORNEY SANDERS:** Stare Decisis.

22 **INMATE PENA THROUGH INTERPRETER:** Stare
23 Decisis, I'm sorry, all (inaudible) exercise an
24 inferior jurisdiction are required to follow
25 decisions the courts exercise in superior
26 jurisdiction. Insofar that (inaudible) is used to
27 indicate that those (inaudible) may be enforced by

9

1 (inaudible). The BPT interpretation of PC 190
2 does not comport with the decision of the
3 California Supreme Court. For example, in the
4 case of the (inaudible) (1980, 28 Cal.3d. 210,
5 217) the court stated, in referring to a minimum
6 term of 25 years imposed pursuant to this section,
7 and (inaudible) vigorously demonstrate that the
8 provision contemplates that the individual
9 sentence under the statute would not automatically
10 receive indeterminate term of life imprisonment.
11 Instead, the statute recognizes that with
12 traditional indeterminate sentence, the term
13 actually imposed upon an individual offender may
14 range from 25 years to life. The Attorney
15 General's proposed interpretation of the statute
16 requires an automatic imposition of a sentence of
17 life imprisonment in every case completely
18 conflicts with the language and for that reason
19 alone must be rejected. Number two, under the
20 group of laws, the BPT has (inaudible) this
21 prisoner only comes within the scope of the
22 limited authority conferred by the determinate
23 sentence (inaudible) which only enables the
24 considerations for setting of release dates to go
25 upon parole outside the prison walls and
26 enclosures. There is not authority, underlined,
27 no authority, for the prison terms (inaudible).